IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil VIII, Rule 32(2) (b)
Description of case

Second Appeal No. 67 of 2002

Chief Engineer Central Zone
Telecommunication Civil,
13, Rana Pratap Marg
Lucknow, U.P. and others

…….Appellants/Defendants

Versus

M/s Dayal Construction Company
120/5 Tallital Bazar Nainital

……Respondents/Plaintiff

ALONG WITH

(Cross Second Appeal No: 2 of 2003)

On behalf of M/s Dayal Construction Company

Versus

Union of India

AND

Civil Revision No: 79 of 2002

Union of India & Others

……Revisionists

Versus

M/s Dayal Construction Company

…….Respondent.

Date of decision: 10th December, 2004

For the approval of:

Hon'ble Mr. Justice Prafulla C. Pant

- Whether the order/judgment should be sent to the reporters of reporting? (Yes)

- Whether the reporters be allowed to see the judgment? (Yes)

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 67 of 2002

Chief Engineer Central Zone
Telecommunication Civil,
13, Rana Pratap Marg
Lucknow, U.P.
and others …… Appellant/Defendants

Versus

M/s. Dayal Construction Company
120/5 Tallital Bazar Nainital
through Sri Deen Dayal Bhatt,
Sole Proprietor. …… Respondent/Plaintiffs

ALONG WITH

(Cross Second Appeal No. 2 of 2003)

On behalf of M/s Dayal Construction Company

Versus

Union of India

AND

Civil Revision No. 79 of 2002

Union of India & Others ……Revisionist-Judgment Debtor

Versus

M/s Dayal Construction Company…….Respondent-
Decree holder

Mr. L.P. Naithani, Sr. Advocate assisted by Mr. J.P. Joshi.
Learned counsel for the Applicant.
Mr. Sudhanshu Dhulia, Sr. Advocate assisted by Mr. D.S. Patni,
learned counsel for the respondent.

Hon'ble Prafulla C. Pant, J.

The above mentioned Second Appeal, Cross Appeal and Civil Revision have arisen out of the Civil suit no. 196

of 1995, M/s Dayal Construction Company Vs. Union of India, as such all the three cased are being taken up together of their disposal.

2. The brief facts of the case are that M/s Dayal Construction Company (plaintiff/decree holder), instituted a suit for declaration and a permanent mandatory injunction before Civil Judge, Nainital, with the allegations that plaintiff is a firm engaged in the business of building construction activities, and Shri Deen Dayal Bhatt (plaintiff no. 2) is the sole proprietor of the said firm. The plaintiffs entered into an agreement with Union of India (defendant/judgment debtor) for construction of inspection quarters being constructed between a period from 06.12.1989 to 05.05.1991. As per the plain allegations, plaintiffs were obliged to start the execution of the work only after pre-requisite conditions contained in the agreement between the parties are fulfilled but unfortunately, the defendants did not discharge obligations on their part which ultimately resulted in delay in completion of the construction work. Due to the agitation on the part of the staff of the defendants, regarding simultaneous construction if their quarters, the construction work of inspection quarters could not be started. When the construction work started, it got hindered due to the cable line passing through the site. It was further pleaded in the plaint that electrification of the building was not included in the scope of work of the plaintiffs. As such the internal plastering could not be completed and the period of contract expired on 05.05.1991. It was further alleged that the defendants, to cover up their lapses, gave notice dated 06.12.1991 to the plaintiffs, pointing out certain deficiencies in the

construction. The reply was given by the plaintiffs to the defendants through their letter dated 18.06.1992. Only vide letter dated 07.07.1992, the defendants informed that electrical work is near its completion. Plaintiffs have alleged that as per the practice prevailing in the defendants department, plaintiffs telegraphically requested for extension of time for completion of the work. However, plaintiffs received a show cause notice dated 15.07.1993 from the Superintending Engineer of the defendant, holding the plaintiff responsible for delay in work and claiming the compensation. The defendants did not even take into account that cement work could not be completed between 23.12.1991 to 03.02.1992 due to heavy snowfall in Nainital. Apart from this, between period 20.07.1992 to 14.08.1992 construction work got held up due to restriction imposed by District Magistrate, Nainital, regarding traffic movement hampering transport of building material within municipal limits. The Superintending Engineer of the defendants vide their letter dated 16.08.1993, imposed a penalty/compensation to the tune of Rs. 5,304.00, for delay of 491 days in the completion of construction work. As per the plaint, under clause-2 of the agreement, the defendants could have imposed the compensation against the contractor only if the delay was on account of the his conduct. Apart from above, amount of compensation determination against the plaintiffs, they had to suffer loss due to escalation of the price amounting to Rs. 4,66,548.00 which should have been paid by the defendants to the plaintiffs under clause 10 CC of the agreement. Lastly, it is pleaded in the plaint that the plaintiffs requested the defendant no. 2 to appoint an arbitrator, to resolve the dispute, in accordance with the provisions of the arbitration

clause no. 25 contained in the agreement between the parties. The notice to the effect was given on 01.04.1994 to the defendants in reply to which the plaintiffs were informed vide letter dated 01.07.1994 that the arbitrator has been appointed. However, the plaintiffs alleged that meanwhile, in view of the principle of law laid down by the Apex Court in Vishwanath Sood Vs. Union of India, AIR, 1989 SC 952, disputes covered under clause 2 of the agreement were not arbitrable. As such, the plaintiffs after giving a notice under section 80 of Code of Civil Procedure, 1908, instituted the suit in question on 29.08.1995.

3. The suit was contested by the defendants and a preliminary objection was raised by moving an application (19A) dated 22.11.1995 under section 34 of Arbitration Act, 1940, which however appears to have been rejected by the trial court, vide its order dated 18.06.1996 on the ground that the dispute relating to compensation to the tune of Rs. 5,304.00, for delay in execution of work under clause 2 of the agreement was out of the purview of clause 25 of the agreement. Thereafter, a written statement was filed on behalf of the defendants in which only the pleas relating to awarding the contract, delay in execution of work and determination of compensation for delay were admitted and rest of the allegations of the plaint as pleaded were denied. In view of the delay of 491 days in completion of the work the amount of compensation for delay was very small. The plaintiffs are not entitled to escalations claimed by them to the tune of Rs.4,66,548.00. It is further pleaded in the written statement that said question could have been decided only be the arbitrator, Shri S.K. Ahuja, who was appointed to decide the dispute.

In the additional plea, it is pleaded by the defendants that the court had no jurisdiction to try the suit in question.

4. After framing the issues and recording the evidence, the learned trial court, vide its judgment and order dated 13.05.1998 decreed the suit for declaration and mandatory injunction directing the defendants to pay Rs. 4,71,852.00 or the amount to be determined by a Committee, to the plaintiffs within a period of three months. Aggrieved by said judgment and decree, the defendants filed an appeal before Allahabad High Court on 24.07.1998. However, in view of notification no. 211/IV-g-27 dated 06.05.1995, under the provisions of sub-section 1 (A) and 1 (B) of section 21 of Bengal, Agra and Assam Civil Courts Act, 1887, as amended by vide Civil Laws Amendment Act, 1991, since the valuation of the appeal was below Rs. 5 lac, the appeal was transferred to the District Judge, Nainital, and ultimately after hearing the parties, the first appeal was decided by the Additional District Judge /First Fast Track Court, Nainital, vide his judgment and other dated-02.05.2002, where by the appeal was partly allowed to the extent of direction of Constitution of a Committee regarding the price escalation, but order dated 16.08.1993 of the Superintending Engineering of the defendant relating to the penalty imposed against the plaintiffs was confirmed. No express direction was given by the learned first appellate court whether it sets aside the mandatory injunction given by the trial court or not except as to the Constitution of Committee. Aggrieved by said judgment and decree, the above mentioned second appeal no. 67 of 2002 was filed by the Chief Engineer Central Zone Telecommunication and others (defendants), and cross appeal no. 2 of 2003 on behalf of M/s Dayal Construction

was preferred. Meanwhile, it appears that the execution proceedings of case no. 67 of 2002 started for execution of the decree in which the defendant- judgment debtors filed their objection paper no. 14 C before the execution court stating therein that amount of escalation does not stand to have been decreed as per the appellate court order as such the execution application should be rejected. However, the Civil Judge (senior division), i.e. the executing court, vide its order dated 21.10.2002 rejected the objection 14 C and directed the decree holder to take the steps, on which the above mentioned Civil Revision No. 79 of 2002 is filed on behalf of Union of India and others.

5. Apart from the questions raised in the Civil Revision, this court has to decide, the substantial question of law (formulated in second appeal) relating to the point, if the suit was barred in view of the finality clause (contained in the clause 2 of the agreement) of the contract. This court also feels that the question relating to the jurisdiction of court can always be seen even if no substantial question of law is framed on such point.

6. I heard learned counsel for the parties at length and perused the voluminous record of the lower court.

7. Before further discussions, this Court feels it necessary to quote the relevant clauses of agreement between the parties regarding construction work in question.

"Clause 2: *The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the tenth part of the contractor and shall be reckoned from the tenth day after the date on which the order the commence the work is issued to the contractor.*

The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to 1 % of such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for everyday that the work remains un-commenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eight of the whole of the work before one-forth of the whole time allowed under the contract has elapsed; three-eights of the work; before one-half of such time has elapsed, and three-forth of the work; before three-forth of such time has elapsed. However, for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge. The contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensate on an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision is writing shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete. Provided always that the entire amount of compensation to be said under the Provisions of this Clauses shall not exceed ten percent of the estimated cost of the work as shown in tender.

Clause 5: *If the contractor shall desire an extension of time for completion of the work on the grounds of his*

having been unavoidably hindered in its execution or on any other ground he shall apply in writing to the Engineer-in-Charge within 30 days of the date of hindrance on account of which he desires such extension as aforesaid, and the Engineer-in-Charge shall it in his opinion (which shall be final) reasonable grounds be shown therefore authorize such extension of time if any as may in his opinion be necessary or proper.

***Clause 10 (CC)** : If the prices of materials (not being materials being supplied or being services rendered at fixed price by the department in accordance with Clause – 10 and 34 hereof) and / or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contractor shall accordingly be valid, subject to the condition that is compensation for escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is validity extended under the provision of clause 5 of the contract without any actions under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is six months or less. Such compensation for escalation in the prices of materials and labour when due, shall be worked out based on the following provisions.*

The base date for working out such escalation shall be the last date on which tenders were stipulated to be received. ……

Clause 25: *Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of the workmanship of materials used on the work or as to any other questions claim, right matter or thing whatsoever in any way arising out of or relating to the contract designs, drawings specifications, estimates, instructions, orders or these conditions or otherwise concerning the work or the execution or the failure or to execute the same whether arising during the progress or the work of after completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, C.P.W.D. incharge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said C.P.W.D. at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he has to deal with the matters to which the contracts relates and that in the course of his duties as Government servant he has expressed views on all or any of matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or beding unable to act for any reasons, such Chief Engineer or administrative head as aforesaid at the time of such transfer vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of C.P.W.D. as aforesaid*

should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitrator at all. In all cases where the cases were total amount of the claim in dispute is Rs. 75,000/- (Rupees Seventy five thousand only) and above the arbitrator shall give reasons for the award.

Subject as aforesaid the provision of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under these clause.

It is also a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputed.

It is also a term of the contract that the contractor (s) do / does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Govt. that the final bill is ready for payment, the name of the contractor(s) will be deemed to have been waived and absolutely barred and the Govt. shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The decision of the Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates or sub standard work which may be decide to be accepted will be final and would not be opened to arbitration."

8. From the perusal of the pleadings of the parties, it is clear that admittedly before filing the suit in question, dispute relating to escalation was got referred by the plaintiff themselves to arbitration which however appears to have not been pursued thereafter by the plaintiffs. Merely for the reason that dispute relating to compensation to the tune of only Rs. 5,304.00 on account of delay in construction, was not arbitrable, it cannot be said if the arbitrator ceased to have jurisdiction over escalation and other matters. In the opinion of this Court, order dated 18.06.1996 passed by learned trial court, and ignoring the said illegality by the lower appellate court cannot be upheld.

9. Learned counsel for the M/s Dayal Construction (plaintiff/decree holders) drew my attention to para 9 of judgment passed Vishwanath Sood Vs. Union of India AIR 1989 SC 952, and contended that the opening expression *"express where otherwise provided in the contract"* in clause 25 of the agreement excludes the jurisdiction of the arbitration in respect of the dispute covered in clause 2. I agree with the submission of the learned counsel to that extent. But that by itself does not exclude the jurisdiction of arbitration relating to escalation of prices or other matters of dispute. As such out of the total amount of Rs. 4,71,852, in respect of Rs. 4,66,548, the jurisdiction of civil court was barred. The substantial question of law is answered accordingly.

10. The most astonishing part of the story in this case is that the trial court has completely shut its eyes to the provisions of Court Fee Act, 1870, and that of Specific Relief Act, 1963 as a mandatory injunction has been issued

for payment of Rs. 4,71,852 by the learned trail court. What appears to have been permitted by courts below is that since for recovery of money, rate of payable court fee is high, the mandatory injunction has been issued for which only Rs. 500/- is maximum court fees. Injunctions are issued under the Specific Relief Act, 1963. Section 39, contained in chapter VIII of said Act, which deals with the mandatory injunctions, read as under:

"39 MANDATORY INJUNCTIONS- When, to prevent the breach of obligations, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach, complaint of an also to compel performances of the requisite acts."

In view of the said provision, a mandatory injunction issued by the trial court, in this case is unheard of in the filed of law. The learned lower appellate court has also erred in law by not up-setting the said part of the decree. Learned counsel for the plaintiff-decree holders, during arguments, made submission to this Court that to do the substantial justice, the court can permit the decree holder to deposit the court fee instead to dismissing the suit on technical ground. In the opinion of this Court, if it is permitted, it may give a bad precedent which will be followed by other litigants, encouraging them to by-pass the provisions of the Court Fee Act, 1870, and only if caught they would deposit the court fee. As such this Court is unable to accept the submission.

11. Now, I come to the question raised in the Civil Revision, which has been filed against the objection 14C in execution case filed by defendant-judgment debtor and were rejected vide order dated 21.10.2002 by the executing

court. In this connection, learned counsel for the plaintiff-decree holders, drew my attention to the principle of law laid down in Bhawan Vaja Vs. Solanki Hanuji Khodaja Mansang and another AIR 1972 SC 1371, and argued that the executing court has rightly rejected objections raised by decree holder-defendants, as it is settled principle of law that executing court cannot go behind the decree under execution. As far as the said principle of law is concerned, this Court is also of the same view but in the present case, it cannot be said if the decree in question is an executable decree. My attention was also drawn on behalf of plaintiff-decree holders to the case law reported in Dhurander Prasad Singh Vs. Jai Prakash University and others (2001) 6 Supreme Court Cases 534 and it is argued that Powers under section 47 of the Code of Civil Procedure, 1908, can be exercised by the executing court only within a narrow spectrum. No doubt, the scope of section 47 is limited one but the present objection as to executability against the decree are within that limited scope. As the above case law contained in Dhurander Prasad Singh (Supra) itself shows that if the decree is not executable or nullity, the executing court can look into that question. As I have discussed above, the suit is not only barred by arbitration clause but also there is illegality in granting relief of mandatory injunctions in a dispute for which suit for recovery of money lies. The decree being nullity is un-executable. As such the impugned order dated 21.10.2002 passed by the executing court is also against the law.

12. In view of the above discussion Civil Revision No. 79 of 2002 and Second Appeal No. 67 of 2002 filed by Defendants deserve to be allowed. As far as cross appeal No. 2 of 2003 is concerned the same is liable to be

dismissed for reasons discussed above. Accordingly Civil Revision No. 79 of 2002 and Second Appeal No. 67 of 2002 are allowed, and cross Second Appeal No. 2 of 2003 is dismissed. The judgment and order dated 02.05.2002 passed by learned Additional District Judge / 1st Fast Track Court, Nainital in C.A. No. 101 of 1998 and judgment and order dated 13.05.1998 passed by learned Civil Judge (Sr. Div.) Nainital (alongwith the Order dated 18/6/1996 on application 19-A) in Civil Suit No. 196 of 1995 are set aside. The said suit is dismissed. The order dated 21.10.2002 (impugned in Civil Revision No. 79 of 2002) passed in Execution Case No. 07 of 2002 arising out of decree passed earlier in above mentioned suit, is also set aside and objections 14-C in said execution case are allowed, and execution is struck of without satisfaction. No order as to costs.

(Prafulla C. Pant, J.)

Dated: December 10, 2004
Sweta